

No. 89-906

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Supreme Court. U.S.

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JOSEPH F. SPANIOLO, JR.
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In The
Supreme Court of the United States
October Term, 1989

J.H.H. and S.C.H.,

Petitioners,

v.

JOSEPH J. O'HARA, WILMA ALLEN, DOROTHY
HELTIBRAND, VIRGINIA ALLEN, DWAIN M.
HOVIS, GARY STANGLER, JEANNIE ONEY,
ANN GULICK, GARY THURMAN, DOROTHY
LAVINGTON, and ROSALIND CONNER,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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COUNTER STATEMENT OF THE CASE

On August 23, 1984, the Missouri Division of Family Services ordered the removal of several foster children from the home of Jack and Sylvia Howard pending resolution of a child-abuse complaint.

On January 27, 1987, the Howards filed suit against eleven officials and employees of the Missouri Division of Family Services alleging a violation of plaintiffs' right to equal protection because of a decision by the Division not to return two unrelated, black foster children to the Howard home. The Howards requested equitable relief and damages. On December 9, 1987, defendants filed a motion for summary judgment asserting, inter alia, the defense of qualified immunity from damages. The motion was supported by documentary evidence and deposition testimony.

On July 14, 1988, after additional briefing, the District Court, Honorable Clyde S. Cahill, entered summary judgment on behalf of all the defendants on the basis of qualified immunity. All remaining issues were voluntarily dismissed. On appeal the Eighth Circuit Court of Appeals affirmed the judgment of the district court dismissing the claims for money damages in its decision filed June 23, 1989.

Statement of Facts

Beginning February 22, 1984, the plaintiffs, Jack and Sylvia Howard, were provisionally licensed by the Missouri Division of Family Services as a Foster Family Group Home. Plaintiffs had been licensed as a foster home for many years prior to 1984.

On August 13, 1984, the State received a hotline report alleging that J.B., a foster child in the custody of DFS, had been physically abused while residing with the plaintiffs. When the child was examined at Cardinal Glennon Children's Hospital, twenty-five to thirty bruises were found on his buttocks, the left side of his face, both legs, and right arm.

An investigation of the child-abuse allegations was immediately commenced by a deputy juvenile officer for the St. Louis County Juvenile Court. J.B. and T.B. were not returned to the plaintiffs' home due to the allegations. C.R. and L.R. were moved to another foster home on August 17, 1984. On August 23, 1984, the St. Louis County DFS office was ordered by Joseph J. O'Hara, DFS Director, to remove R.T. and A.T. and J.W. and M.W. from the Howard Home pending resolution of the child-abuse complaint. J.W. and M.W. were placed at the Salvation Army; R.T. and A.T. were placed with a black foster family.

On September 17, 1984, the Howards voluntarily surrendered their Foster Family Group Home license.

On September 19, 1984, Joseph J. O'Hara, took the following actions following correspondence and discussions with the Howards' attorney:

- (1) Acknowledged the voluntary surrender of the Howards' Foster Family Group Home license.

- (2) Provided that the Howards would retain a foster family license for two foster children on a provisional basis for six months with such other conditions as the St. Louis County DFS office might set. [Provisional foster

home licenses are authorized by state law pursuant to § 210.486(6), RSMo 1986.]

(3) Directed that J.W. and M.W., who were temporarily residing in a shelter at the Salvation Army, be replaced in the Howard home with a plan for adoption.

(4) Indicated that R.T. and A.T. would not be returned to the Howard home because a more appropriate placement had been established.

(5) Directed DFS not to place any additional children in the Howard home during the six-month period.

(6) Directed that information gathered during the child-abuse investigation would not be used adversely to prevent the prospective adoption of J.W. and M.W. by the Howards.

On October 9, 1984, the Howards, by counsel, asked O'Hara to reconsider his decision not to return R.T. and A.T. to the Howard home. The plaintiffs also requested a written clarification of the reasons why the existing placement of the children was "more appropriate." On October 29, 1987, DFS Director O'Hara stated the following as his reasons for not placing the children back in the Howards' home:

The recent incident of reported child abuse of a child in the care of Mr. and Mrs. Howard has been evaluated as being the result of stress due to heavy continuous child care responsibilities. At the time of the reported incident, Mr. and Mrs. Howard were caring for ten (10) children, eight of whom were age seven years or younger.

DFS has determined that child abuse or neglect would likely reoccur if all the children were to remain in the home.

DFS has identified some family problems which contributed to the incident of child abuse and has recommended and offered appropriate services toward the resolution of the problems.

The Division of Family Services records reflect that Jack and Sylvia Howard have been excellent foster/adoptive parents for a number of years. Due to the problems currently experienced by the family, it is our decision that [A.T.] and [R.T.] will not be returned to the Howard home.

Under Missouri law, the Howards were entitled to a judicial review of the Director's decision pursuant to the provisions of § 210.526, RSMo 1986, which provides that:

Any person aggrieved by a final decision of the division made in the administration of §§ 210.481 to 210.536 shall be entitled to judicial review as provided in Chapter 536, RSMo.

The Howards chose to forego their judicial remedy and sought to utilize an internal grievance procedure which is made available to foster home licensees.

The grievance procedure utilized by the Howards involves five steps. On January 2, 1985, after a conference with defendant Wilma Allen, Social Service Supervisor II, the Howards were informed that their Step One grievance was being denied for the following reasons: "(1) A child abuse/neglect report was received on August 13, 1984, regarding J.B. who was placed in your home as a foster child. An investigative worker, Dianna Adorjan, Deputy Juvenile Officer, St. Louis County Juvenile Court, found during her investigation 'reason to suspect that the

allegations were true.' (2) At this time you have a provisional foster home license for *two children* for six months extending from October 1, 1984, through March 31, 1985. J.W. and M.W. have been returned to your home. (3) The agency's plan for R.T. and A.T. is for them to remain in their present foster home."

After a Step Two conference hearing on January 9, 1985, defendant Dorothy Heltibrand, ACSW, a Social Service Supervisor III, advised the Howards that their grievance could not be granted because the Howards only had a foster family license for two children on a provisional basis for six months pursuant to the direction of the Division Director.

On February 5, 1985, defendant Virginia Allen, County Director of the St. Louis Division of Family Services, conducted an extensive informal hearing in order to complete the Step Three administrative review of the Howards' grievance. Director Virginia Allen found that:

It was agreed that the [T.] children were removed from your home following a child abuse and neglect report to the state Hotline. A foster child placed in your home was found by a hospital examination to be suffering from numerous bruises of the face and body. Both old and new bruises were noted by the attending physician on the child's cheek, thigh, legs and arms. The investigative worker found "reason to suspect", resulting in the temporary removal of all foster children in your home, including the two [T.] children. The perpetrator remains unknown.

Her decision was expressed as follows:

I regret that my decision at this time must be that the future needs of the [T.] children can best be met in the [J.]'s home. The plan for these children at this time is reunification with their father. Since the father has expressed his desire to provide a home for his children and plans to return to this area, the [J.]s appear to be in a better position to assist in the reunification with the father as the [J.]s are able to provide both cultural and religious experiences to prepare the children for this event. Over the past six months the [T.] children have made a good adjustment to the [J.]'s household (i.e., school adjustment, behavior, etc.).

At step four, defendant Dwain Hovis, Acting Deputy Director of the Division, denied plaintiffs' grievance. Hovis found that the decision to remove A.T. and R.T. from plaintiffs' home was based "upon substantial evidence that the best interests of the children would not be served if they remained in your care." Hovis indicated that since the removal of the children from plaintiffs' home, the Division's case plan for the children had changed from one of placement for adoption to eventual reunification with their natural father. Thus, the "racial and cultural needs of the children" became "a primary consideration" after the change in the placement plan, and replacement in the plaintiffs' home would not be in the children's best interest.

On April 30, 1985, Gary Stangler, the Division's acting director, denied plaintiffs' grievance at the fifth and final step of the grievance procedure.¹ Stangler concluded

¹ Under Mo. Rev. Stat. § 536.100, plaintiffs could have pursued judicial review of the Division's final decision denying their grievance.

that removal of A.T. and R.T. from the defendants' home was appropriate and in their best interest, and that "the children should be in a home that has a similar cultural and ethnic background to their own."

For the purpose of resolving the issue of qualified immunity, the district court was requested to presume that race was considered by various defendants in deciding whether to place the children back in the Howard home. Race was not considered when the decision was made to remove the foster children from the Howard home.

The recommendations and decisions of the defendants were made pursuant to the "Guideline for Placement Resources Selection" published by DFS as part of its Alternative Care Handbook. The Guidelines contained six "Issues to be Considered in Selecting a Particular Foster Home":

- a. Proximity of the foster home to the child's family in order to facilitate visitation and reunification.
- b. The extent to which the foster family can accept the child's relationship with his family and can deal adequately with situations which may arise from that relationship.
- c. The ability of the foster family to preserve the child's racial, cultural, ethnic, and religious heritage. In most cases, every attempt must be made to match the child with a foster family of the same racial, cultural, ethnic and religious background.

- d. The extent to which the interests, strengths, and abilities of the foster family enable the family to relate to the child's needs, including his individual problems; age; interests; intelligence; moral and ethical development; family relationships; educational status; social adjustment; and plans for the future.
- e. The extent to which the foster family can meet the needs of a sibling group, in order to avoid the separation of siblings.
- f. Proximity of the foster home to specialized services or facilities which the child may need.

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REASONS WHY WRIT OF CERTIORARI
SHOULD NOT BE GRANTED

The decision below does not conflict with any opinion of this Court regarding the application of qualified immunity so as to justify issuance of a writ of certiorari.

The court of appeals' decision below is not contrary to any previous decision of this Court regarding the application of qualified immunity. In *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 3039 (1987), this Court reaffirmed its prior immunity decisions which "... establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of preexisting law the unlawfulness must be apparent."

As the Eighth Circuit Court of Appeals opined in *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987):

Qualified immunity would be meaningless if it could be defeated merely by the recitation of some well-recognized right and a conclusory allegation of the defendant infringed it. To determine a qualified immunity defense, the court must focus on the specific nature of the conduct complained of and the state of the law with respect to the identified conduct at the time the official acted.

Id. at 1459, n. 16.

The petitioners characterize their action as involving the denial of "custody" of two black foster children to petitioners because of race. Petitioners' characterization is erroneous. This case has never involved a "custody" decision. The issue presented to the district court and the Eighth Circuit Court of Appeals was whether the eleven named defendants were acting contrary to clearly established constitutional law when the Division of Family Services refused to return two minor children to the Howard home for temporary foster care after the children had been removed because of an incident of abuse in the Howard foster home. At all times in question, the Division of Family Services had legal custody of the children and the natural father retained his parental rights. This action is only concerned with the rights of persons who provide temporary foster care. This case does not involve the considerations which must go into adoption proceedings or disputes regarding the custody rights of natural parents.

The decision of the Court of Appeals regarding the application of *Palmore v. Sidoti*, 466 U.S. 429 (1984), is

entirely correct. It is simply unreasonable "to read *Palmore* as a broad prescription against the consideration of race in matters of child custody and foster care placement." Petitioners' Appendix, A-12.

"Foster parents do not enjoy the same constitutional protections that natural parents do." *Backlund v. Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985); see also *Kyees v. County Department of Public Welfare*, 600 F.2d 693, 698 (7th Cir. 1979); *Drummond v. Fulton County Department of Family and Children's Services*, 563 F.2d 1200, 1206-1207 (5th Cir. 1977) (en banc), cert. denied 437 U.S. 9, 10 (1978); *Sherrard v. Owens*, 484 F. Supp. 728, 740-741 (W.D. Mich. 1980), aff'd 644 F.2d 542 (6th Cir.) (per curiam), cert. denied 454 U.S. 828 (1981). The eleven defendants named in this action were not faced with the issue of whether to terminate the custody of a natural parent. Instead, they had to make a very difficult decision regarding whether two young foster children should be removed from the appropriate foster home in which they had been placed after the abuse incident for the purpose of returning them to the foster care of the Howards.

The narrow question considered by the United States Supreme Court in *Palmore* was "[w]hether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother." *Palmore*, 466 U.S. at 433. It is absurd to argue that *Palmore v. Sidoti* clearly established a legal rule that social service workers and their supervisors violate a white couple's rights by considering the racial background of prospective foster parents. Under the circumstances, the court of appeals correctly held that the defendants were immune from

liability because they did not act in violation of any clearly established constitutional rule.

There exists no case law in the State of Missouri nor any federal case law prior to 1988 discussing the question of whether a social service worker or supervisor can consider the racial heritage of a child or the racial and cultural background of unrelated foster parents when making foster care placement decisions. A foster care placement is very different from an adoption or custody proceeding, which necessarily involves the making of final decisions regarding the permanent custody of a child. For purposes of applying the qualified immunity doctrine, a decision which held that it was a violation of equal protection to consider the race of a child in a custody proceeding would not necessarily mean that it was a violation of the Constitution to consider race in the context of foster care placements. However, the existing precedent in both custody and adoption proceedings indicates that race may be considered as a relevant factor in determining the best interests of a child. See *Drummond v. Fulton County Department of Family and Children's Services*, 563 F.2d 1200, 1204-1205 (5th Cir. 1977); *Annot.: Race as a Factor in Adoption Proceedings*, 34 A.L.R.4d 167 (1982).

The first reported federal case to directly discuss the issue of race in the context of foster care is *McLaughlin v. Pernsley*, 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd* 876 F.2d 308 (3d Cir. 1989), wherein a district court issued a preliminary injunction requiring Philadelphia to return a black foster child to the care of white foster parents after the court decided the child was removed from their care solely on the basis of race. The doctrine of qualified

immunity does not permit the petitioners herein to argue backward from a factually distinct 1988 district court decision that the respondents should have known in 1984 that a consideration of race was unconstitutional. Thus, the court below correctly held:

While the *McLaughlin* case and the instant case both involved application of a race-based foster placement policy, there are several important differences. In *McLaughlin*, the court found that the decision to *remove* a black foster child from the home of white foster parents was based solely on race. *McLaughlin*, 693 F. Supp. at 324. The court also recognized that "the goal of making an adequate long-term foster care placement that provides for a foster child's racial and cultural needs" was consistent with the best interests of the child which was, in turn, a compelling governmental interest for purposes of the Equal Protection Clause. The court rejected the categorical application of race, but did recognize that a proper placement decision included a determination whether foster parents could adequately provide for a child's racial and cultural needs.

Petitioners' Appendix, A11-A12.

The facts of this case set forth in the court of appeals decision and recited in respondents' statement of the case indicate the complete frivolity of petitioners' argument that the respondents were engaged in some racist conspiracy to violate petitioners' rights. Petitioners' conclusory statement that race was the only factor ever considered by the respondents is pure fantasy.

For the purpose of resolving the issue of qualified immunity, the district court was asked to presume that

race was considered by the various defendants in deciding whether to place the children back in the Howards' foster home. The factual record, however, as recited by the court of appeals, establishes that there were several obvious factors involved in the decisions and recommendations made by the DFS social service workers and their supervisors. First, a child had been severely abused while residing with the Howard family. The incident of abuse was the reason for removal of all the foster children from the Howard home. Second, after the Howards surrendered their Foster Family Group Home license, they were only granted a provisional license for two children for a six-month period of time. DFS made the decision to limit the number of children allowed by the provisional license because of concerns that the Howards had been trying to care for too many children. A third factor, which developed during the grievance process, was the natural father's continued interest in obtaining custody of the children if he was released from prison. When that issue arose, DFS had to consider the question of which foster family home environment would most help facilitate reunification. The natural father's Black Muslim religion became a consideration. Finally, after the children remained in their current placement for a significant number of months and bonding had occurred, there was the additional factor of whether the Howards' desire should be allowed to disrupt an otherwise appropriate relationship in which the children were thriving. The best interests of the children was the paramount concern of every state official or employee who recommended a course of action, made a decision, or reviewed the situation.

The respondents submit that the court of appeals did not overlook or misapprehend any factual or legal issue regarding the application of qualified immunity in this case. Any expansive reading of *Palmore v. Sidoti* for the purpose of defeating qualified immunity would be directly contrary to the doctrine expressed in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny, which requires that the constitutional rule be clearly established from an objective perspective before an official can be held liable for damages. *Palmore* does not establish any rule regarding temporary foster care placements. The court of appeals correctly held that the respondents did not subject themselves to potential liability for damages by following guidelines set forth by the State of Missouri regarding the placement of foster children.

Contrary to the wild assertions of the petitioners, the opinion below has no impact whatsoever upon the pronouncements of this Court regarding equal protection. The court below simply decided that the petitioners are not entitled to money damages because the uniqueness of their cause warrants the application of qualified immunity. The petitioners have never been foreclosed from otherwise pursuing the merits of their claim.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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